Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

Cecil G. Bailey

Petitioner

v.

Lorraine Caldwell, as Personal Representative
Of the Estate of Virgil Earnest Bailey

Respondent

On Petition For Writ Of Certiorari To
The District Court of Appeals of The State of Florida
For the Second District

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Has the respondent committed "extrinsic fraud" or fraud on the court for failure to release the mental disability hospital records of decedent to the probate court? Did the respondent fail to timely notify petitioner of the probate proceedings?

2. Under the due process clause of the 14th amendment, has the state unlawfully deprived petitioner of his property, by violating his constitutional right to procedural due process?

3. Is Fla. Rule App. 9.330 unconstitutional, and a violation of the equal protection clause of the 14th amendment, by placing petitioner in an arbitrary classification that does not treat person's similarly situated alike?

4. Due to respondents "extrinsic fraud" or fraud on the court, did the probate court misinterpret the legal effect of the evidence?

5. Should the burden of proof have shifted to the proponent of the 1984 will offered for probate due to decedents adjudication of incompetency (i.e. by receiving social security mental disability compensation from 1966 until his death) or due to respondents undue influence in procuring the will?

6. Is the 1984 will offered for probate void due to testator's mental incapacity? Does petitioner have a vested property right that the U.S. Supreme Court should consider? Should the U.S. Supreme Court take action sua sponte to expunge the ruling of the probate court?

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, petitioner states that all parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is unpublished. The opinion of the probate court appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided the case was December 11, 2009. A copy of that decision appears at Appendix B. A timely petition for rehearing was thereafter denied on the following date: January 12, 2010, and a copy of the order denying rehearing appears at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment to the U.S. Constitution provides in relevant part: Nor shall any state deprive any person of life, liberty, or property without due process of law. Nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. art. XIV, cl.1

STATEMENT

This case raises Due Process and Equal Protection Clause issues of the U.S. Constitution that this court should consider when deciding its discretionary review.

Throughout this petition, the petitioner will reference different aspects of fraud that should be considered by this court. By accepting the respondents fraudulent actions, the State of Florida (" the state") has constructively denied the petitioner's procedural due process rights. Petitioner's property rights have been taken away by the state without due process of law. Due to respondents fraud on the court, fair process/ procedure did not occur in either the probate case or the appellate case.

At the state appellate level, petitioner was a civil appellate pro se litigant. Florida's second district court of appeal, affirmed the probate courts decision per curiam. This decision caused an equal protection clause violation which has resulted in the petitioner being part of an arbitrary classification. By placing the petitioner in an arbitrary classification, the state has discriminated the petitioner in his request for a written opinion.

The state is further shutting the door on the petitioner's constitutional right to procedural due process by denying a written opinion. By denying a written opinion, the state is denying jurisdiction for state supreme court review and the petitioner is seeking the discretionary review of the U.S. Supreme Court.

FACTS

Decedent, Virgil Earnest Bailey ("Virgil"), died August 11, 2004. The case was filed in probate court September 09, 2004. A last will and testament, dated August 06, 1984, was admitted to probate and letters of administration were issued on September 22, 2004. The beneficiaries of the 1984 will entered in probate were Mrs. Lorraine Caldwell ("Lorraine") and the Masonic Home. The order admitting the will to probate stated that no objections had been made to the will's probate when in fact no notice had been received by Cecil G. Bailey ("Cecil") until October 28, 2004. This was because a certified letter was improperly addressed to C.G. Patterson and sent to Cecil's address. The certified letter was not accepted by Cecil and Cecil believes this was an act of fraud. (i.e. an act to conceal the proper notice that Cecil was entitled to receive).

Because of lack of proper notice, Cecil was not given enough time to 1) respond, 2) shop for an attorney, and 3) ascertain his legal rights. In a some what hurried frenzy, Cecil retained an attorney and on December 22, 2004, filed a petition to revoke probate of the 1984 will. An amended petition was filed January 31, 2005. The petition alleged that Virgil lacked the mental capacity to execute the will. At the time of the execution of the 1984 will, Virgil lacked the mental capacity to such a degree that he did not comprehend the nature and condition of his property, his relations to those that are the natural objects of his bounty, the practical effect of the will and that undue influence was exercised by Lorraine in procuring the will. Virgil had a long history of mental illness. Virgil had no surviving spouse or children. Virgil had eight siblings, one died in

infancy. Virgil's estate if he died intestate: 1) Cecil George Bailey (brother), 2) Lorraine Caldwell (sister), 3) Barbara Ann Ledoux (sister) 4) Lois Hart (sister) 5) Margie Paterson (sister) 6) Portia Ledoux, Raymond Bailey, Donald Bailey, (children of deceased brother Robert Bailey), and 7) Richard Bailey, David Bailey (children of deceased brother James Bailey).

Lorraine filed an answer and defenses to petition to revoke probate and eventually filed a motion for summary judgement. Several affidavits were filed in support of and in opposition to the motion for summary judgement. The affidavits in support of this motion were made by people who had no qualifications to determine the facts 21 years after the will was executed. Cecil's former attorney ("Mr. Edenfield") attempted to depose the attorney who drafted the will ("Mr.Curry"), on several occasions. It appears that Mr. Curry would not make himself available for a deposition. Service of process was never effectuated on Mr. Curry. Mr. Edenfield agreed to the stipulation before he could get to the bottom of Mr. Curry's lack of cooperation. Cecil filed an affidavit in opposition to summary judgement which referenced Virgil's guardian and mental condition.

On March 29, 2005, court documents were filed that attest to Virgil being diagnosed in 1969, with schizophrenic reaction schize, affective type, being chronic. Chronic would mean marked by a long duration or frequent occurrences. The particular hallucinations are hostile, bizarre manner, inappropriate affect, has rushes of panic, blocking, somatic preoccupation, severe anxiety, suicidal ideation, poor judgement, no insight. Virgil was committed into a state hospital by a petition of family

members Lorraine Caldwell and Robert Bailey signed on October 28, 1969.

Beginning in 1966, Virgil started to receive social security disability for mental incompetence and continued to receive this disability until his death. The social security disability check was mailed to Lorraine/Malcolm Caldwell as designated payee, because Virgil was unable to handle his affairs. Lorraine verified receipt of these disability payments in a deposition referenced below (i.e. Caldwell v. Morris).

In a rescission court case (Caldwell v. Morris, 2002), Lorraine, in her capacity as plenarian guardian, filed suit to rescind certain deeds that Virgil used to convey his real property away. Lorraine presented evidence that Virgil had in fact been mentally incapacitated and diagnosed with schizophrenia, paranoid type, in the 1970's, as well as diagnosis of dementia and major depression with psychotic features. Lorraine used Dr. Jaffrey Hashimie's affidavit to rescind deeds that Virgil used to convey ownership of his real property. Virgil, not being of sound mind, was giving his property away for free and Lorraine as Virgil's plenary guardian had the property replevined by court order due to Virgil's mental incapacity. The affidavit from Dr. Hashimie, is an affidavit in support of Lorraine's motion for summary judgement in Caldwell v. Morris. This affidavit references Virgil being Baker Acted for refusing treatment after a fall and being found naked trying to have a bowel movement on the floor. It should be noted that without the Caldwell v. Morris case, even this affidavit would have been unattainable because of Lorraine's refusal to allow release of Virgil's mental disability hospital records.

On May 23, 2005, Mr. Edenfield filed a "motion for issuance of order compelling James A. Haley Veterans Hospital to release documents". In this motion the court is advised that the nature and extent of the decedent's mental capacity is relevant to the pending issue before this court. On May 25, 2005, Lorraine filed an "objection to motion for issuance of an order compelling James A. Haley Veterans Hospital to release records". It was contended that the discovery sought was too broad and entry of a protective order was sought prohibiting discovery concerning medical records for 1997 and subsequent years. Five days after Lorraine's objection to release of medical records and protective order, a stipulation was presented to Cecil to sign. Cecil remembers being summoned to Mr Edenfield's office but not being informed about the stipulation until his arrival. It should be noted that Cecil is 82 years old, legally blind/visually impaired, and did not understand the facts presented by Mr. Edenfield. Cecil says he arrived at Mr. Edenfield's office and was told to sign the stipulation, "this is the best i can do". He was told to sign on a certain line, and due to his visual impairment, he signed where he was instructed to sign without reading the document. Lorraine, Virgil's personal representative, and 75% beneficiary to Virgil's probated will, entered into the stipulation and settlement agreement in order to avoid a court order that would allow the James A. Haley medical records of Virgil to be entered into the probate court. These medical records would have the extent and history of Virgil's mental disability. The release of these medical records would have a huge impact on this case. These records are still unavailable to Cecil without Lorraine's consent.

Since Lorraine was the personal representative and a 75% beneficiary of Virgil's probated will, a conflict of interest prevented her from her fiduciary position of revealing Virgil's mental condition to the court. Lorraine had a personal interest in not revealing all of Virgil's mental history to the court.

The stipulation was signed on May 30, 2005. The court approved the stipulation on July 20, 2005. After two (2) years, an amended order to show cause was entered by Judge Sexton on July 31, 2007. This was due to deficiencies pertaining to the final accounting. A petition to extend time for final accounting was filed on August 9, 2007. This petition explains the sale of two (2) parcels of land and the petition to revoke the will as the reasons for the delay. The accounting of personal representative was filed November 16, 2007. A petition for discharge was filed November 17, 2007. A letter was sent to Lorraine's attorney ("Mr. Rydberg") by Cecil on December 6, 2007, seeking corrections to the final accounting. Cecil did not intend to file the letter with the court, but was sent to Mr. Rydberg seeking corrections, who filed the letter with the court three (3) months later.

On January 14, 2008, a joint motion for approval of final accounting and a petition for discharge was filed with the court. This document indicates Cecil approved the final accounting even after Cecil's objections were mailed to Mr. Rydberg. The joint motion is not a joint motion at all. The document was prepared by Mr. Rydberg and sent to Mr. Edenfield who signed the motion without Cecil's knowledge or consent. On January 23, 2008, a motion for leave to withdraw as Cecil's attorney was filed. An order authorizing the withdrawal of attorney was

entered on January 30, 2008. This order deemed Cecil to appear pro se.

On February 20, 2008, Cecil sent a letter of complaint to the Florida Bar advising that Virgil had a history of mental illness that was not being revealed by Mr. Rydberg. In fact, Mr. Rydberg's letter dated March 10, 2008, in response to Cecil's Florida Bar complaint, admitted to Virgil's diagnosis of schizophrenia, paranoid type in the 1970's. In this letter, Mr. Rydberg explained his representation of Lorraine in her capacity as guardian of Virgil's property pertaining to the 2002 rescission case. On March 5, 2008, a Florida Bar inquiry complaint form was filed against Judge Sexton for allowing an invalid will into probate. Thereafter, on March 7, 2008, Mr. Rydberg files with the court Cecil's letter for corrections to final accounting. These corrections were referred to by Mr. Rydberg as objections to final accounting.

A notice of filing objection to accounting of personal representative and petition for discharge was filed on March 7, 2008. The personal representative's response to Cecil's objection was filed on May 12, 2008. An order on joint motion and for approval of final accounting and on objection thereto was entered by Judge Sexton on July 30, 2008. The order accepted the final accounting, apparently discharged the personal representative of her duties, and denied Cecil's objections. On August 20, 2008, a notice of appeal was filed.

On October 19, 2009, with the appeal still pending, Mr. Rydberg wrote Judge Isom a letter with a proposed order, pursuant to a "dismissal docket" hearing, that would have discharged the personal

representative "nunc pro tunc" to July 31, 2008. Cecil wrote a letter objecting to the entry of this order on October 22, 2009, and the order went unsigned. Florida's 2nd DCA has held the personal representative accountable throughout the appellate proceedings. If there was a clerical error in the court file, no notice was ever given to Cecil.

Summary of Argument

Cecil's arguments before this court are titled Argument I : Constitutional Argument and Argument II: Will Contest. The standard of review for Cecil's appeal to Florida's 2nd DCA was based on the probate courts abuse of discretion. Cecil will also include additional factors that occurred at the appellate level which the U.S. Supreme Court should consider when deciding its discretionary power of review, pertaining to Cecil's Petition for Writ of Certiorari.

Cecil's appeal centered on a similar case from the 5th District Court of Appeal. This court decided a similar set of facts by reverse and remand. Grimes v. The Estate of Stewart, 506 SO 2d 465 (Fla. 5th DCA 1987). Cecil also relied on a Florida Supreme Court case, Declare v. Yohanan , 453 SO 2d 375 (Fla.1984), that defined "intrinsic" and "extrinsic" fraud to show the court that Lorraine's failure to produce Virgil's mental disability records amounted to "extrinsic" fraud or a "fraud on the court", thus denying Cecil his opportunity to present his case in court. The Florida Supreme Court also applied the principles of Declare v. Yohanan, **supra** , to probate proceedings in Arrieta-Gimenez v. Arrieta-Negron , 551 SO 2d 1184 (Fla. 1984), by applying these

principles of "intrinsic" and "extrinsic" fraud. Cecil now brings these issues in front of the U.S. Supreme Court. Due to Lorraine's fraud on the court, the state has violated Cecil's procedural due process rights.

The 2nd DCA affirmed the lower courts decision on December 11, 2009. The opinion was per curiam. Cecil filed a timely motion for rehearing on December 23, 2009, which included a request for a written opinion. Cecil's motion for rehearing was denied on January 12, 2010. The court did not provide a written opinion.

By denying Cecil's motion for rehearing, the state denied Cecil's procedural due process rights. Cecil's appeal had already been affirmed per curiam and the state was aware that Cecil's appeal centered on "extrinsic" fraud or "fraud on the court". This was because Lorraine did not produce the mental disability hospital records of Virgil to the probate court. Cecil is legally blind and was not given proper notice about the will being entered in probate right from the start of the case. The state could have insured that Cecil's procedural due process rights were not violated by granting a rehearing. Additionally, by denying Cecil's request for a written opinion, the state has denied Cecil jurisdiction in their state supreme court. The state is denying Cecil's procedural due process rights and the U.S. Supreme Court should grant review to insure Cecil is granted due process of law.

Fraud on the Court

Cecil would like to summarize to this court each instance of fraud that has occurred in this case:

1) the improperly addressed certified letter to inform "interested parties" under the probate code. Cecil feels this was fraud because he wasn't given proper notice that a will was being probated. He knows his sister knows his name. The certified letter did not have Cecil's name on it so he didn't sign accepting the letter. Mr. Rydberg represented to the probate court that everyone had been notified and no one had answered. Mr. Rydberg then waited five weeks after the order admitting the will to probate and letters of administration were issued before notifying Cecil. Cecil was not notified timely. He was not present at any court proceedings that would have given him a chance to contest the will. This denied his right to procedural due process right from the beginning of the case.

Cecil would also like the court to know that he previously had conversations with Lorraine and she knew Cecil's position on Virgil's mental capacity to execute a will. Cecil was not aware that Virgil had executed a will in 1984. Lorraine had been receiving Virgil's disability check for mental incompetence since 1966. In 1984, Lorraine must have had Virgil execute a will. Cecil has known Virgil to be mentally incompetent his entire adult life. Cecil alleged undue influence in procuring the will in the probate case, but not to the appeals court. Cecil would like this court to consider based on circumstantial evidence that undue influence in procuring the will is the most likely outcome of this case.

Virgil had attempted to lease property to Cecil in 1983, which resulted in a lawsuit, but the court

determined that Virgil was incompetent so mutual releases were drawn up with the owner of the property, Margaret Rhodes and Cecil. The court should note that this was in 1983 and the will was executed in 1984.

Cecil was not notified timely because Lorraine knew he would contest the will. Lorraine, herself had signed an order to have Virgil Baker Acted in the late 1970's. She also used his incompetence adjudication to rescind the deeds Virgil conveyed in 2002.

2) the Final Accounting:

a) Cecil's letter of objection that Mr. Rydberg filed three months later as "objection to final accounting".

b) joint motion for approval to final accounting even after Mr. Rydberg had received Cecil's objection letter.

c) This "joint motion" was signed by Mr. Edenfield who withdrew from the case nine days later. Mr. Edenfield charged Cecil a large amount of money and then withdrew from the case. Cecil could no longer afford an attorney.

d) A final letter/motion was written by Cecil to Judge Sexton on August 10, 2008, seeking an independent audit and dismissal of order approving final accounting. This motion was interpreted by a different Judge Claudia R. Isom, to be a motion for rehearing. Judge Isom denied this motion on August 20, 2008. Cecil has no understanding why his letter addressed to Judge Sexton was interpreted and denied by Judge Isom. Judge Isom had no prior knowledge of this case other than reviewing the court

file. Judge Sexton was apparently moved to a different court.

3) "Extrinsic" fraud committed by Lorraine for breaching her fiduciary duty as personal representative of the estate to turn over the mental disability records to the court. (i.e. fraud on the court, see, Declare v. Yohanan, **supra**). This "extrinsic" fraud prevented Cecil his opportunity to present his case in court.

4) Fraud in the inducement of the contract pertaining to the stipulation. Since Lorraine did not reveal to the court all of Virgil's mental history, she fraudulently induced Cecil and his former attorney to sign the stipulation. This was a fraud on the court because if Virgil's mental history had been revealed to the court, the judge may not have allowed entry of the stipulation.

5) Letter written to Judge Isom by Mr. Rydberg with a nunc pro tunc order pursuant to a "dismissal docket" hearing before the appellate case was decided and before the issuance of a mandate. Cecil, wrote a letter of objection to Judge Isom and the order went unsigned.

6) The appeals court awarded Lorraine attorney's fees. Mr. Rydberg filed a Table of Attorney fees amounting to $16,156.50. The probate court has ordered mediation. Cecil feels Mr. Rydberg's filing is to discourage U.S Supreme Court review.

Argument I: Constitutional Argument

Cecil would like the U.S. Supreme Court to understand his position on a violation of The Due Process Clause of the 14th Amendment and the Equal

Protection Clause of the 14th Amendment violation that he has encountered.

I. Due Process Clause of the 14th Amendment: This clause to the U.S. Constitution provides that the state shall not take a person's life, liberty, or property without due process of law. The state deprived Cecil of his property right entitlement by not requiring Lorraine to produce Virgil's mental disability records. Cecil has a statutory right to this inheritance and the state deprived Cecil of his entitlement. Fla. Stat. 732.103(3), (2002). Cecil has a legitimate claim or entitlement under state or federal law. Bell v. Burson, 402 U.S. 535 (1971).

The state violated Cecil due process of law by allowing the will into probate without Cecil being notified properly. By not providing Virgil's mental disability medical records, case law will show that Lorraine committed "extrinsic" fraud or fraud on the court. For equity reasons, the fraud on the court would make the state responsible for the taking of Cecil's property rights. This fraud on the court prevented Cecil from his vested property right entitlement. Cecil was unlawfully divested of his property. Matter of Estate of Newland , 730 P.2d 351 (Kan. 1986). The decedents death is the event which vests an heir's right to intestate property. Fla. Stat. 732.101(2), (2002), Huskea's Estate v. Doody , 391 SO 2d 779 (Fla. 4th DCA 1980), Jefferson v. Fink , 247 U.S. 288 (1918). A prerequisite to the use of a due process analysis is the existence of a property right. Once a property right is recognized it must be determined that the deprivation resulted in some governmental action. Cleveland Board of Education v. Loudermill , 470 U.S. 532 (1985).

Cecil's procedural due process rights were violated. He had a right to proper notice (i.e. fair process/procedure), which requires at the very least an opportunity to present objections to a fair and impartial decision maker, regarding the legality of the will, from the start of the case to its conclusion. While all intentional government deprivations of life, liberty, or property require fair process, what constitutes fair process in terms of the timing and scope of the hearing varies according to the scope of the deprivation. The determination of what due process requires in the way of specific procedures requires consideration of three distinct factors:

i) The private interest that will be affected by the official action;

ii) The risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and

iii) The government interest on fiscal and administrative efficiency. Mathews v. Eldridge, 424 U.S. 319 (1976).

The fraud on the court makes the state responsible for the taking of Cecil's property right entitlement with no adequate remedy. When the government affords no remedy or inadequate remedies a deprivation of life, liberty, or property may result. Florida Prepaid Expense Board v. College Savings Bank, 527 U.S. 627 (1999). Whenever the government enforces private claims to property of one person against another, it has acted to deprive someone of his property. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). The state deprived Cecil of his property without due process of law and as a

result Cecil has a constitutional right to procedural due process before the U.S. Supreme Court.

II. Equal Protection Clause of the 14th Amendment: 2nd DCA per curiam decision. On appeal to the 2nd DCA, Cecil was a civil appellate pro se litigant. The appellate court affirmed the probate court's decision per curiam. The Florida Rules of Appellate Procedure were amended in 2002. The amendments were filed by The Florida Bar Appellate Court Rules Committee, effective January 1, 2003, to allow a litigant to request a district court to issue a written opinion if one is likely to provide a basis for further review in the Florida Supreme Court. Amendments to the Florida Rules of Appellate Procedure , 827 SO 2d 888 (Fla. 2002). The Florida Supreme Court accepted jurisdiction pursuant to art. V, 2(a), Fla. Const.; Fla. R. Jud. Admin. 2.130(c). Fla. Rule App. 9.330 is unconstitutional. This rule states: "When a decision is entered without opinion, and a party believes that a written opinion would be needed for supreme court review, the motion for rehearing; clarification; certification, may include a request that the court issue a written opinion." This rule further states that if this request is made by an attorney, it shall include the following statement: "I express a belief, based upon a reasoned and studied professional judgement, that a written opinion will provide a legitimate basis for supreme court review because (state with specificity the reasons why the supreme court would be likely to grant review if an opinion were written)".

A civil appellant pro se litigant is not afforded the same consideration for a written opinion that an attorney would get under the same or similar circumstances. Equal protection guarantees that

similarly situated persons will be treated alike. If the government "presumes facts" against a person so that he is not qualified for some important benefit or right, the irrebuttable presumption may be unconstitutional. This is an equal protection question because the government is creating an arbitrary classification. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). This case involved the mandatory maternity leave for Cleveland, Ohio, and Chesterfield County, Virginia, School Boards. In addition to the equal protection violation, the Court held that the Cleveland three month return provision also violated due process being both arbitrary and irrational.

This rule clearly has a discriminatory intent on the part of the state government by giving attorney's a better opportunity to receive a written opinion than a civil appellant pro se litigant. In Vlandis v. Klein, 412 U.S. 441 (1973), the court struck down a college tuition system which did not allow individuals a fair chance to prove they were residents of the state, infringing appellee's rights to due process and equal protection of the laws, and noted that "permanent and irrebuttable presumptions have long been disfavored under the due process clauses of the 5th and 14th amendments." Where a law treats a person or class of persons differently from others, it is an equal protection question. Village of Willowbrook v. Grace, 528 U.S. 562 (2000), equal protection claims may be brought by a class with as few a one member.

Cecil belongs to a suspect classification. He was a civil appellant pro se litigant. There is clearly intent to discriminate on the part of the state. Even if the government action appears neutral on its face

and in its application but has a disproportionate impact on a particular class of persons, it should be found to involve a classification, if a court finds that the lawmaking body enacted or maintained the law for a discriminatory purpose. If an attorney feels based on his professional judgement that a written opinion is needed for supreme court review, Florida's appellate rules give him specific language to request such a written opinion. A civil appellant pro se litigant is discriminated against even if, as in Cecil's case, he has a viable reason to request a written opinion, to seek supreme court review because of a conflict between two district court of appeals.

If Cecil is considered a suspect classification, this court should apply the strict scrutiny standard and strike the rule of appellate procedure giving lawyers an advantage to request a written opinion, unless it is necessary to achieve a compelling or overriding government purpose. The Court will always consider whether less burdensome means for accomplishing the legislative goal are available. Under this classification, the government has the burden of proof to prove that the law is necessary.

This rule of appellate procedure could also be reviewed under the quasi-suspect classification. Here, the Court uses intermediate scrutiny. This standard will likely require the government to prove that the action is substantially related to an important government purpose. The government should have the burden of proving that the law is necessary.

The Court could also use the rational basis standard, where a law will be upheld if it is rationally related to a legitimate interest unless it is arbitrary or irrational. Cecil's response to being

placed in this classification would be that the government is creating an arbitrary classification by "presuming facts" against a person so that he is not qualified for some important benefit or right. Cleveland Board of Education v. LaFleur, **supra**. Cecil would contend that the state is creating an irrebuttable presumption of this classifications incompetence. Stanley v. Illinois , 405 U.S. 645 (1972). The state is creating an irrebuttable presumption incapable of being overcome. Carrington v. Rash , 380 U.S. 89 (1965). The Court held that a permanent irrebuttable presumption of nonresidence violated the equal protection clause of the 14th amendment.

Cecil was entitled to a written opinion whether he was represented by an attorney or a civil appellant pro se litigant. He has presented a case based on "extrinsic" fraud to the 2nd DCA. He has presented several cases in his favor and specifically a case from the 5th DCA that consists of similar facts. Grimes v. The Estate of Stewart, **supra**. Upon receipt of the per curiam decision, he has timely made a request for a written opinion. Cecil would like for the U.S. Supreme Court to consider whether the state has treated him different from lawyers seeking a written opinion and if this treatment was "irrational or wholly arbitrary." Village of Willowbrook v.Grace, **supra**.

Cecil now seeks the discretionary review of the U.S. Supreme Court. Cecil feels that due to Lorraine's fraudulent actions, he should have constitutional protections that the U.S. Supreme Court should analyze to determine if the state violated his procedural due process rights. Cecil also feels that the state violated the equal protection

clause of the 14th amendment by not providing an equal opportunity for Cecil to obtain a written opinion.

Argument II: Will Contest

Petitioner is entitled to an intestate share of decedent, Virgil Bailey's estate pursuant to Fla. Stat. 732.103(3), (2002), being a blood brother of Virgil.

Petitioner can show the court that Virgil had a long history of mental incapacity. Virgil received social security disability income from 1966 until his death. Virgil's medical records would show a long history of schizophrenic reaction, schize affective type being chronic. The particular hallucinations were hostile, bizarre manner, inappropriate affect, blocking, severe anxiety, suicidal ideation, poor judgement, no insight, somatic preoccupation with rushes of panic. Due to previous on going mental incapacity, decedent was incompetent at the time he made out the will with no lucid interval.

In the case of In Re Estate of Weihe,275 SO 2d 244 (Fla. 1973), the Florida Supreme Court held that evidence including testimony that the testator knew nothing that was going on around him, did strange things and lived in the past sustained the order revoking probate of a 1965 will. The appellate court noted that appellate courts will not interfere with with probate courts findings of testamentary capacity unless there is an absence of substantial competent evidence to support its findings or unless it appears the probate court misapprehended the legal effect of the evidence as a whole. The appellate court ruled that the trial judge misapprehended the legal effect of the evidence and denied the order

revoking the will. The supreme court quashed the appellate courts ruling and reinstated the revocation order of the probate court.

A will may be rejected for mental incapacity. In Skelton v. Davis , 133 SO 2d 432 (Fla. DCA 1961), adjudication of incompetency of a testator amounted to a prima facie case in favor of petitioner seeking revocation of probate of a will for lack of testamentary capacity and placed the burden on the proponents of the will to produce evidence as to the capacity of the testatrix at the time the will was executed. Where the subject will is executed after the testator has been declared legally incompetent, it must be proved that the testator returned to a state of testamentary capacity by demonstrating that the will was executed during a lucid interval. In Re Estate of Supplee 247 SO 2d 488 (Fla.2d DCA 1971). The making of a will does not depend on a sound body but a sound mind. The term "sound mind" means the ability of the testator "to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed. In Re Bailey's Estate, 122 SO 2d 243 (Fla. App. 1960).

Testator's testamentary capacity to execute a valid will has been described as having the ability to mentally understand in a general way 1) the nature and extent of the property to be disposed of, 2) the testator's relation to those who would naturally claim a substantial benefit from his will, and 3) a general understanding of the practical effect of the will as

executed. In Re Wilmott's Estate, 66 SO 2d 465 (Fla.1953).

A will should be held invalid for lack of testamentary capacity if it is executed as a result of an insane delusion. An insane delusion that affects one's understanding of the natural objects of one's bounty, the nature and extent of one's property, or the nature of the testamentary act, and that materially affects one's disposition of one's property, may invalidate a will. In re Hodtum's Estate , 267 SO 2d 686 (Fla. 2nd DCA 1972). This case involved a decedent who executed a will leaving the residue of the estate to the Masonic Lodge, of which he was a member. The decedent believing he was expelled as a member, removed the Lodge as a beneficiary of his will. His attorney, after checking his claims, advised the decedent that there was no basis for his belief. The decedent had another will drawn up by another attorney, which was admitted to probate but later revoked. On appeal, the appellate court affirmed, pointing out that there was no evidence to establish any basis for decedent's belief.

The case of In re Palmer's Estate , 48 SO 2d 733 (Fla. 1950), involved the brother of the decedent who filed petition for revocation of probate of a will, alleging that testatrix lacked mental capacity and that executor and chief beneficiary had exercised undue influence over testatrix. Florida's Supreme Court held that the evidence sustained the findings of the trial court that the mental condition of the testatrix had been impaired due to excessive use of alcohol, that the appellant occupied a confidential relationship with the testatrix, that he actively participated in the drafting and execution of the will, and was the chief beneficiary thereunder and kept

the will exclusively in his possession until after the death of the testatrix, and therefore there was a presumption of undue influence. The burden of proof was on the appellant, as the proponent of the will, to produce evidence "which at least balances that of the contestant, to show that the will was executed freely and without his influence;" and the appellant had failed to carry this burden. Lorraine was 75 % beneficiary of the will, occupied a confidential relationship with Virgil, kept the will in her exclusive control and therefore should carry the burden of proving the absence of undue influence and testamentary capacity as the proponent of the will.

If a substantial beneficiary under a will occupies a confidential relationship with a testator and is active in procuring the contested will, a presumption of undue influence arises. In re Estate of Carpenter , 253 SO 2d 697 (Fla. 1971). Perhaps, Mr. Curry could have testified that Lorraine was active and present in procuring the will. If Lorraine was present in procuring the will, a prima facie case of undue influence could have been accomplished and the burden would have shifted to the proponents of the will. The case of In re Reid's Estate , 138 SO 2d 342 (Fla. 3rd DCA 1962), held that it should be remembered that there is rarely any direct evidence to establish undue influence. Oftentimes, undue influence is established by the results of what has transpired. Where the only legitimate inferences from the facts and circumstances of the case warrant a finding of undue influence, no direct evidence is necessary. In re Reid's Estate, **supra**.

Geogia's Supreme Court held in Kievman v. Kievman , 400 S.E.2d 317 (Ga.1991), that evidence as to state of mind of the testator prior to and

subsequent to the date of the execution of the will may illustrate the incompetency of the testator at the time of its execution. This court ruled that the affidavit of one of the testators daughters covering a reasonable period of time before and after the execution of the will creates inferences that could be drawn that the testator lacked the requisite mental capacity. In response to Lorraine's motion for summary judgement, Cecil filed an affidavit with the probate court referencing Virgil's mental condition. Where a condition of incapacity is shown to exist prior to the execution of a will, and it is further shown that this condition continues for a period of time subsequent to the date of execution, it is evidence showing incapacity at the time of execution. Ware v. Hill , 71 S.E.2d 630 (Ga. 1952).

Lorraine refused to release Virgil's medical records and because of this refusal, Cecil has not had his day in court to contest the 1984 will that Lorraine offered for probate. Medical evidence is often used to determine mental capacity. Experts who never saw the testator can render opinions based on the testators medical records. Roberts v. Baker , 463 S.E.2d 694 (Ga. 1995). Here, the contested evidence on capacity consisted of medical opinion testimony to a statement recorded in the medical records. The court held that a doctors opinion recorded in medical records was not hearsay and admissible at trial. The Georgia Court of Appeals relied on Roberts v. Baker, **supra** , to uphold that an experts testimony based on medical record evidence that schizophrenia is pervasive and practically intractable and that medication only controls the symptoms, but does not work or work effectively. In re J.M.M., 534 S.E. 2d 892 (Ga. App. 2000).

In the case of Matter of Estate of Kesler , 702 P.2d 86 (Utah 1985), expert testimony was used to show that by examining decedents medical records the decedent suffered from paranoid ideation, a paranoid condition that obstructed the natural objects of the testatrix's bounty. The experts testimony after examining the medical records was that the testatrix had previously been diagnosed with paranoid psychosis and advanced arteriosclerosis, both progressive in nature, which caused insane delusions that affected her understanding of the natural objects of her bounty, the nature and extent of her property, or the nature of the testamentary act. In re Hodtum, **supra** . Utah's Supreme Court held that the testatrix was mentally incompetent at the time she made the will and trust. This court noted that a psychiatrist may testify on mental competency of a testator without personally examining the testator. In re Richards Estate , 297 P.2d 542 (Utah 1956). In this case, a proper foundation was laid for psychiatric testimony based on hospital records to determine that the testatrix lacked mental capacity to execute a codicil. The medical records librarian testified that she was the custodian of the records, and although she did not make the entries herself, she was familiar with them and they were prepared in the ordinary course of hospital business. An intern supplemented her testimony, explaining both the nature and regularity of keeping such records. Utah's Supreme Court held that there was adequate foundation from which the trial judge could find the records credible, reliable, and hence admissible and that "These records are relied upon for the treatment of patients and the

preservation of human life. Any motive for falsifying them by doctors or staff appear to be lacking."

Virgil had a long history of mental incompetency which included a long history of schizophrenic reaction, schize affective type being chronic. The particular hallucinations were hostile, bizarre manner, suicidal ideation, poor judgement, no insight, somatic preoccupation with rushes of panic. Beginning in 1966, Virgil started to receive social security disability for mental incompetency and continued to receive this disability income until his death. The receipt of mental disability compensation should be considered an adjudication of incompetency. Adjudication of incompetency of a testator creates a prima facie case against the proponent of such a will. In Re Ziy's Estate, 223 SO 2d 42 (Fla.1969). The Supreme Court of Florida stated in this case that "an adjudication of incompetency shifts the burden of going forward with the evidence of the testator's competency from the contestant of the will to the proponent of the will." (see also Skelton v. Davis), **supra**. At the appellate level of In Re Estate Ziy, 213 SO 2d 503 (Fla. 3rd DCA 1968), the court noted that it would not disturb the order of the county court in a will contest if there is substantial evidence to sustain the court's findings, unless the court misinterpreted the legal effect of the evidence. Lorraine did not provide the probate court with Virgil's mental disability records which is a fraud on the court. This fraud on the court resulted in the probate court's misinterpretation of the legal effect of Lorraine's nondisclosure.

In Grimes v. The Estate of Stewart, **supra** , Grimes appealed from a judgement by the probate court which dismissed her objection to distribution of

assets and her petition to revoke the probate of a will in the Estate of Edith Stewart. The probate court refused to consider the merits of the Grimes' petition because it was "untimely" and the 5th DCA reversed. The court noted that although the petition could have been more artfully drawn, it was deemed sufficient and timely pursuant to rule 1.540(b), she was an "interested party" under the probate code. As an interested party, Grimes was entitled to have been served with notice of her aunt's estate. Fla. Stat. 731.301(2) (a) and (4) (1985). The Court held that the petition sufficiently alleged fraud, by failing to inform the probate court that Stewart had been declared incompetent at the time she executed the will that was offered for probate, and not providing proper notice to "interested parties", as a basis to open the estate after the order of discharge was entered.

Lorraine admits to Virgil's mental incapacity in 1969. However, Lorraine refused to produce Virgil's mental history to the court. In a 2002 recission case, in her capacity as plenarian guardian of Virgil's property, Lorraine presented evidence to the court that Virgil had in fact been mentally incapacitated and diagnosed with schizophrenia, paranoid type, in the late 1970's. Since Lorraine was the personal representative of Virgil's estate and 75% beneficiary to the 1984 will offered for probate, a conflict of interest prevented her from her fiduciary position of revealing Virgil's mental history to the court. Lorraine had a personal interest in not revealing all of Virgil's mental history to the court. Fraud is a ground upon which a probate proceeding may be opened after an order of discharge is issued.

Van Dusen v. Southeast First National Bank, 478 SO 2d 82 (Fla 3rd DCA 1985).

As the personal representative to Virgil's estate, Lorraine had a duty to the court to reveal all of Virgil's mental history. The court held in Grimes v. The Estate of Stewart, supra, that such a situation imposes a duty on the part of the proponent to reveal to the probate court the fact of decendents incompetency, and would make all known beneficiaries under a prior will, or heirs at law, "interested parties" due informal notice under the probate code. Section 731.201(21) Florida Statutes (1985) reads as follows: "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceeding. It should be noted that Fla. Stat. 731.301(2), (2002), now requires formal notice.

Lorraine's refusal to disclose Virgil's mental history to the court was intentional. An estate which has been closed can be reopened for the type of intentional misconduct which amounts to fraud. Liechty v. Hall, 687 SO 2d 64 (Fla. 5th DCA 1997), (fraud is recognized as a justification for reopening an estate, even after an order of discharge has been entered). In Dean v. Bentley , 848 SO 2d 487 (Fla. 5th DCA 2003), the appellate court reopened a probate case based on "fraud on the court." This case involved a personal representative, also an attorney, who filed a petition, under oath, representing that there were no other interested persons in the proceeding when he had previously been notified of a subsequent will

to the will that was offered for probate. The court held that failure to bring the subsequent will to the attention of the trial court and the misstatement of facts are not only violations of the duties of the personal representative, they violate the attorney's "Oath of Admission to the Florida Bar".

In the case of American Red Cross v. In Re Estate of Haynsworth, 708 SO 2d 602 (Fla. 3rd DCA 1998), the court noted that there were three issues essential to the determination of the case: 1) what is required to establish testamentary capacity in the presence of a prior adjudication of incompetency, 2) what party bears the burden of demonstrating testamentary capacity, and was that burden adequately met in this case and, 3) if one part of the will is invalid as a product of undue influence, is the entire will void. The court recognized that testamentary capacity, or "sound mind" is the ability of the testator to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed." In Re Wilmott's Estate, **supra** , ("...the ability to understand the nature and extent of his property, the natural objects of his bounty, or the general process of will making"). The court noted where the subject will is executed after the testator has been declared legally incompetent, it must be proved that the testator returned to a state of testementary capacity by demonstrating that the will was executed during a lucid moment. In Re Estate of Supplee, **supra**. ("Florida law is likewise well settled to the effect that although an incompetency adjudication creates a

presumption of lack of testamentary capacity as to any will thereafter executed during the continuance of such adjudication, that such presumption may be overcome on proof that the will was executed by an adjudged incompetent during a lucid interval"). A "lucid moment" is a period of time during which the testator returned to a state of comprehension and possessed actual testamentary capacity. This court also noted that "an adjudication of incompetency shifts the burden of going forward with the evidence to the proponent of the will" In re Estate of Ziy, **supra**. Finally, this court cited Fla. Stat. 732.5165 (1995), and struck only the portion of the will that was admitted to probate that was a product of undue influence.

Lorraine never had to overcome the presumption of Virgil's mental incompetency. The 1984 will was probated and Lorraine refused to provide the probate court with Virgil's mental history. This denied Cecil's constitutional right to procedural due process, by denying Cecil a fair hearing on the validity of the 1984 will. The probate court misinterpreted the legal effect of Lorraine's nondisclosure of Virgil's mental disability records. Lorraine's lack of disclosure of Virgil's mental disability records was a fraud on the court which prevented the probate court from shifting the burden of proof to the proponents of the will.

The stipulation entered into by petitioner is void. The essence of a stipulation is an agreement between the parties. To avoid the consequences of a stipulation properly entered into, a party must show that the agreement is the product of fraud, misrepresentation, or mistake of fact. McGoey v. State , 736 SO 2d 31 (Fla. 3d DCA 1999). This court

held that there was no meeting of the minds between the parties as to the nature or scope of the purported pretrial stipulation. The defendant's conviction of DUI manslaughter was reversed because of lack of mutual assent by the parties.

Cecil relied on Mr. Edenfield to explain the terms of the stipulation. However, Mr. Edenfield and Judge Sexton were relying on Lorraine's representations pertaining to Virgil's mental capacity at the time he made the will. By not revealing all of Virgil's mental history, Lorraine misrepresented a material fact of the contract. This lack of disclosure is a fraudulent inducement to enter the contract. There was no meeting of the minds in regards to the nature and scope of the stipulation entered between the parties. McGoey v. State, **supra**.

By not revealing to the court Virgil's prior mental history, Lorraine fraudulently induced Cecil, and Cecil's former attorney to enter the stipulation, and the court to accept the stipulation. This fraudulent inducement resulted in Lorraine committing a fraud on the court. The court noted in Robbins v. Ogden Corp., 490 F. Supp. 801 (1980), that the essential elements of fraudulent inducement of misrepresentation in the making of a contract are a false representation of a material fact and reliance thereon by the plantiff to his detriment. Lorraine did not produce Virgil's mental disability hospital records which resulted in a fraudulent inducement to enter the stipulation. Where there is a fraudulent inducement of the contract, the fraudulent misrepresentation vitiates every part of the contract. D & M Jupiter, Inc. v. Friedopfer, 853 SO 2d 485 (Fla. 4th DCA 2003). Rescission is available for fraudulent nondisclosure where there has been

intentional concealment of any fact material to the transaction. Billian v. Mobile Corp., 710 SO 2d 984 (Fla. 4th DCA 1998).

In DeClare v. Yohanan, **supra** , the Supreme Court determined that "extrinsic fraud" occurs when defendant has somehow been prevented from participating in the case. Lorraine's failure to provide the mental incapacity hospital records of Virgil prevented Cecil from further contesting the will. This prevented Cecil from participating in the case.

Florida's Supreme Court applied the principles of DeClaire v. Yohanan, **supra** , to probate proceedings in Arrieta-Gimenez v. Arrieta-Negron, **supra** . In DeClaire v. Yohanan, **supra** , Florida's Supreme Court delineated those actions challenging a judgement that must be brought within one year and those that have no time limitation under rule 1.540(b): Within one year under Rule 1.540(b)

1) Mistake, inadvertence, surprise, or excusable neglect.

2) Newly discovered evidence which could not have been discovered in time to move for a new trial.

3) Any type of fraud, misrepresentation, or other conduct of an adverse party including intrinsic fraud which occurs during the proceeding such as false testimony.

No time limitation under Rule 1.540(b) or Independent Action

1) Where the judgement is void.

2) Where it can be established that the judgement is satisfied, release or discharged.

3) Where the judgement has prospective application and equity should now require relief from its present enforcement.

4) Extrinsic fraud which prevents a party an opportunity to present its case in court.

The Florida Supreme Court defined "fraud on the court" in DeClare v. Yohanan, **supra** , as:

> "The prevention of an unsuccessful party from presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise; ignorance of the adversary about the existence of the suit or the acts of the plantiff; fraudulent representation of a party without his consent and connivance in his defeat; and so on."

In Martina Theater Corp. v. Schine Chain Theaters, Inc. , 278 F. 2d 798 (2d Cir. 1960), the second circuit said that if a proper case of fraud on the court had been presented, a "defrauded district court would have been empowered to take action sua sponte to expunge the judgement." Federal courts have inherent power to investigate whether a judgement was obtained by fraud. Universal Oil Products Co. v. Root Ref. Co. , 328 U.S. 575 (1946).

Cecil's appeal to Florida's Second District Court of Appeal may not have been diligent enough to ferret out all the facts and issues pertaining to the fraud on the court. Cecil has included additional facts and issues in an attempt to fully explain the case. Cecil's request for discretionary U.S. Supreme Court review relies on the

interpretation of the case of Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944), in which the Supreme Court noted that:

> "tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judical process must always wait upon the diligence of litigants."

Conclusion

Cecil would like to take this opportunity to thank you for your time and attention. Cecil would additionally like you to know that he is disabled. He is a legally blind veteran of World War II who has put his life on the line for this country so that all Americans can enjoy the benefits of our Constitution. Cecil asks that you accept discretionary review of his Petition for Writ of Certioari addressed to the U.S. Supreme Court.

Respectfully submitted,

Cecil G. Bailey

Pro Se

April 7, 2010

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUTY, FLORIDA
PROBATE DIVISION

FILE NO. 04-2475
DIVISION A

IN RE: ESTATE OF
VIRGIL EARNEST BAILEY,
Deceased

ORDER ON JOINT MOTION FOR APPROVAL OF FINAL ACCOUNTING AND PETITION FOR DISCHARGE
AND ON OBJECTING THERETO

THIS CAUSE came on for consideration on the JOINT MOTION FOR APPROVAL OF FINAL ACCOUNTING AND PETITION FOR DISCHARGE (the "Joint Motion") and OBJECTION TO ACCOUNTING AND PETITION FOR DISCHARGE OF CECIL G. BAILEY (the "Objection"), and the Court having reviewed the record, heard the

arguments of Mr. Cecil Bailey and of counsel for the Personal Representative, and otherwise having been duly advised in the premises, it is thereupon

ORDERED AND ADJUDGED as follows:

1. The joint Motion is hereby GRANTED as follows:

a. The final accounting is accepted and approved; provided however, that since both Mr. Cecil Bailey and the Personal Representative advised the Court that Cecil Bailey's former lawyer, Michael Edenfield, was paid in full; therefore, the Personal Representative shall pay Cecil Bailey the amount previously designated for payment to Mr. Edenfield;

b. The Personal Representative is discharged from her duties and the surety on the Personal Representative's bond, if any, is released from further liability; and

c. The Court retains jurisdiction to award reasonable fees and costs to the Personal Representative's counsel for services rendered in conjunction with the Objection

2. The Objection is OVERRULED and DENIED.

DONE AND ORDERED at Tampa, Hillsborough County, Florida this 31 day of July 2008.

/S/SUSAN SEXTON
The Honorable Susan Sexton,
Circuit Judge

Cc: Lorraine Caldwell
Cecil G. Bailey
Thomas Rydeberg
Seth Rothstein

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CECIL G. BAILEY,)
Appellant,)
v. Case No. 2D08-4202
LORRAINE CALDWELL, as Personal)
Representative of the Estate of Virgil Bailey,)
Appellee.)
)

Opinion filed December 11, 2009.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Susan Sexton, Judge.
Cecil G. Bailey, pro se.

Thomas H. Rydberg of The Rydberg Law Firm, P.A., Tampa, for Apellee.

PER CURIAM.

Affirmed.
SILBERMAN, VILLANTI, AND LaROSE, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

January 12, 2010

CASE NO.: 2d08–4202
L.T. No.: 04–2475

Cecil G. Bailey v. In Re: Estate of Virgil Earnest Bailey

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Cecil G. Bailey Thomas H. Rydberg, Esq.
Honorable Susan Sexton Pat Frank, Clerk

me

/S/JAMES BIRKHOLD
James Birkhold

ClerkIN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA SECOND DISTRICT,
POST OFFICE BOX 327, LAKELAND, FL 33802-0327

February 10, 2010

CASE NO.: 2d08-4202
L.T. No.: 04-2475

Cecil G. Bailey v. In Re: Estate of Virgil Earnest Bailey

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for a written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Cecil G. Bailey Thomas H. Rydberg, Esq.
Honorable Susan Sexton Pat Frank, Clerk

me

/S/JAMES BIRKHOLD
James Birkhold
Clerk

RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
JUL - 7 2010
OFFICE OF THE CLERK

No. 09-1219

IN THE

Supreme Court of the United States

Cecil G. Bailey

Petitioner

v.

Lorraine Caldwell, as Personal Representative
Of the Estate of Virgil Earnest Bailey

Respondent

On Petition For Writ Of Certiorari To
The District Court of Appeals of The State of Florida
For the Second District

PETITION FOR REHEARING

Cecil G. Bailey
10405 Williams Road
Thonotosassa, Florida 33592
813-480-4924

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Law Library

Additional Questions Presented

1. Is the stipulation null and void? Was there "no meeting of the minds" in regards to the nature and scope of the stipulation entered between the parties?

2. Has an erroneous deprivation of petitioners property rights occurred?

3. In order to ensure petitioners procedural due process rights were not violated, should the state have required a hearing on the admissibility of decedents mental disability hospital records prior to accepting the stipulation? Does petitioner have a property right interest in decedent's mental disability hospital records?

4. Should respondent's failure to release decedent's mental disability hospital records to the probate court have been a basis for her removal as personal representative to the decedent's estate?

5. Pertaining to Cecil's request for a written opinion, has the state created an "irrebuttable presumption" of incompetence under the equal protection clause of the 14th amendment, by enacting Fla. Rule 9.330?

6. Does Lorraine's "intrinsic fraud" of not revealing the value of Virgil's estate to Cecil offer substantial grounds not previously presented for a rehearing?

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, petitioner state that all parties appear in the caption of the case on the cover page.

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Petition for Rehearing

A careful analysis of the Petition for Writ of Certiorari has resulted in Petitioners request to add "questions presented", with commentary to follow, for the U.S. Supreme Court's review.

A Null and Void Stipulation

Cecil failed to mention the void stipulation as one of the questions presented. Cecil feels that by adding the void stipulation as a main issue in his case would serve as an intervening circumstance of a substantial effect.

Cecil wants this court to know that he is the only heir of the six remaining intestate heirs (not including Lorraine) who signed the stipulation and he is legally blind. In the stipulation, Mr. Rydberg included the attorney for Masonic Home but did not include any of the remaining intestate heirs. Since the five remaining intestate heirs did not sign the stipulation, Cecil cites McGoey v. State, **supra**, to show this court that there was "no meeting of the minds" in regards to the nature and scope of the stipulation.

Cecil feels that Lorraine's failure to release Virgil's medical records is "extrinsic fraud" or fraud on the court which amounts to a fraudulent inducement of the contract. Cecil would like this court to recognize that: 1) the fraudulent inducement, 2) the lack of signatures of the (5) five remaining intestate heirs, and 3) Cecil's legal blindness are evidence that.there was "no meeting of the minds" in

regards to the nature and scope of the stipulation entered between the parties. McGoey v. State, **supra**.

An Erroneous Deprivation of Cecil's Property Rights

Cecil feels that due to Lorraine's fraud on the court, the U.S. Supreme Court should recognize the risk of an erroneous deprivation of his private property interest. Mathews v. Eldridge, **supra**. By making the assertion that an erroneous deprivation of his property rights a main issue of the case, Cecil alleges this deprivation to be an intervening circumstance of a substantial effect that this court should consider. Cecil cites Sniadach v. Family Finance Corp., **supra**, where the court held that Wisconsin's prejudgment garnishment of wage procedure, with its obvious taking of property without notice and prior hearing, violates the fundamental principles of procedural due process.

No hearing was ever afforded to Cecil pursuant to his request for Lorraine to produce Virgil's medical records. This amounted to a taking of Cecil's property without due process of law. Cecil's position is that the probate court should not have accepted the stipulation without ruling on his pending motion requesting Lorraine to produce Virgil's medical records. This lack of hearing on Cecil's pending motion to produce Virgil's medical records prevented Cecil from presenting his case in court. Declare v. Yohanan, **supra**.

Cecil's Procedural Due Process Rights

Cecil knows that there must be a property right for him to request constitutional protections.

Cecil cites Fla. Stat. 732.101(2), (2002), Huskea's Estate v. Doody, **supra,** to state that the decedent's death is the event which vests an heir's right to intestate property. By not requiring Lorraine to produce Virgil's mental disability hospital records, the state deprived Cecil of his property right entitlement. No hearing was ever held in response to Cecil's request for Lorraine to produce Virgil's medical records. This lack of hearing on Cecil's request for these records deprived Cecil of his legitimate claim or entitlement in respect to his property interest. Board of Regents v. Ross, 408 U.S. 564 (1972), Bell v. Burson, **supra**. In Perry v. Sindermann, 408 U.S. 593 (1972), the court held that though a subjective "expectancy" of job tenure is not protected by procedural due process, respondents allegation that a property right or tenure policy arose because of rules and understandings officially promulgated and fostered, obligated the college to afford a hearing before termination.

Cecil directs the courts attention to Roberts v. Baker, **supra**, to show this court that Georgia's Supreme Court held that a doctor can review the medical records of a testator without ever personally examining him and based on his medical experience and review of the medical records can render opinions of the testators mental capacity. In addition Utah's Supreme Court addressed medical records in the case of In re Richards Estate, **supra**, and held: "These records are relied upon for the treatment of patients and the preservation of human life. Any motives for falsifying them by doctors or staff appear to be lacking." These two state supreme court cases provide case law upon which precedent can be

established. Black's law dictionary's 9th edition provides the following definitions:

precedent 1) The making of a law by a court in recognizing new rules while administering justice. promulgate 2) To put (a law or decree) into force or effect. decree 2) A court's final judgement.

Cecil feels that his interest in Virgil's mental disability hospital records in a will contest in which Virgil's mental capacity is in issue should afford him the constitutional protections of procedural due process. Case law precedent established in these two state supreme court cases, pertaining to a testators mental capacity, should show this court that rules and understandings officially promulgated exist for a legitimate claim for a property right entitlement. Perry v. Sindermann, **supra**. Cecil has a "property" interest in Virgil's mental disability hospital records. Florida's Supreme Court held in Declare v. Yohanan, **supra** , that "extrinsic fraud" occurs when a litigant has somehow been prevented from participating in the case. Florida's probate judge should have required a hearing and made a ruling on the admissibility of Virgil's mental disability hospital records before accepting the stipulation to insure Cecil was afforded due process of law. Perry v. Sindermann, **supra**, Board of Regents v. Roth, **supra**.

Cecil was a civil appellate pro se litigant. He knows his appeal to Florida's 2nd DCA was not perfect. However, his allegation of Lorraine's fraud on the court or "extrinsic" fraud for failure to produce Virgil's mental disability hospital records is an intervening circumstance of a substantial effect that this court should consider. Cecil cites Pio v. Ramsier, 623 N.E. 2d 174 (Ohio App. 9 Dist. 1993), where it

was held that since there were allegations of the testators mental competency and that the testator may have been subject to undue influence, an executor's refusal to waive the physician patient privilege may be a basis for the executor's removal.

As the personal representative of Virgil's estate, Lorraine had a fiduciary duty to allow release of Virgil's mental disability hospital records to the probate court. The probate court should have required a hearing on Cecil's motion to produce these medical records before accepting the stipulation, in order to ensure Cecil's procedural due process rights were not violated. Pursuant to Pio v. Ramsier, **supra**, Lorraine's failure to release Virgil's medical records should have been a basis for her removal as personal representative.

An Irrebuttable Presumption of Incompetence

In Cleveland Board of Education v. LaFleur, **supra,** the court ruled that if the government "presumes facts" against a person so that he is not qualified for some important benefit or right, the irrebuttable presumption may be unconstitutional. Cecil previously referenced that the state created an irrebuttable presumption of incompetence when a civil appellant pro se litigant is placed in the rational basis standard regarding a request for a written opinion.

Cecil would now like to make this "irrebuttable presumption" a main issue (questions presented) of this case. Cecil feels that by making his claim that the state created an "irrebuttable presumption" of incompetence when a civil appellant pro se litigant requests a written opinion instead of his previous

position as "a response to being placed in the rational basis standard", would serve as an intervening circumstance of a substantial effect. This would enable the U.S. Supreme Court to determine whether Fla. Rule 9.330 is unconstitutional because it creates an irrebuttable presumption of incompetence for a civil appellant pro se litigant who seeks a written opinion. Cecil's position is that Fla. Rule 9.330 creates an unconstitutional irrebuttable presumption of incompetence for a civil appellate pro se litigant no matter what classification he lands in.

Cecil previously cited Vlandis v. Klein, **supra,** to show the court that "permanent and irrebuttable presumptions have long been disfavored under the due process clauses of the 5th and 14th amendments." Cecil also feels that the state's failure to provide a written opinion created an irrebuttable presumption of incompetence incapable of being overcome. Carrington v. Rash, **supra**. Cecil was not afforded the same consideration for a written opinion that an attorney would receive under the same or similar circumstances. Cecil would not have brought this issue before this court if he did not feel that an attorney would have received a written opinion upon request in this case. By being pro se, Cecil could not overcome the state's irrebuttable presumption of incompetence.

Fla. Rule 9.330 appears neutral on its face and in its application. However, the lawmaking body has enacted or maintained this law for a discriminatory purpose. Cecil understands that the Florida Bar Appellate Court Rules Committee and the Florida Supreme Court has the state government's interest of fiscal and administrative efficiency in mind. Mathews v. Eldridge, **supra.**

However, Cecil wants this court to recognize that Florida's 2nd DCA discriminated his request for a written opinion based on the fact that he was not represented by an attorney. Cecil would like to cite Village of Willowbrook v. Grace, **supra,** to remind this court that equal protection claims may be brought by a class with as few as one member. Cecil feels his case is unique for the following reasons: 1) this is a civil case, 2) a will contest with a void stipulation due to fraud in the inducement of the contract, 3) several instances of fraud on the court exist which makes the state responsible for the taking of Cecil's property without due process of law, 4) Cecil feels he has a property interest in Virgil's medical records, and 5) Cecil is legally blind.

Fraud on the Court

Cecil would like to briefly explain a few areas of fraud that should be considered.

The improperly addressed certified letter to inform "interested parties" under the probate code was not specifically mentioned in Cecil's appeal to Florida's 2nd DCA. Cecil simply stated to the appellate court that he was not notified about the probate proceedings until October 28, 2004.

Cecil requests that the U.S. Supreme Court take a closer look at the way this case started. A certified letter was sent to Cecil's address to C.G. Patterson instead of C.G. Bailey, so Cecil did not accept the letter. Cecil wants this court to understand that the very first letter was an act to conceal the proper notice Cecil was entitled to receive. Fla. Stat. 731.301 (2), (2002).

The case was being run through the probate court at a rapid pace until a stipulation was entered. After the stipulation, Lorraine waited two years before submitting the final accounting and that was only after Judge Sexton entered an order to show cause. Cecil thinks that the time lapse was due to Lorraine's "intrinsic fraud" of covering up the value or extent of the estate. Cecil feels that after he was fraudulently induced to sign the stipulation, Lorraine took her time before submitting a final accounting in order to mislead Cecil regarding the extent and value of Virgil's estate.

In Arrieta-Gimenez v. Arrieta-Negron, **supra,** the party's five children of the decedent reached a property settlement which resolved a dispute over the division of their late father's estate. The appellant, one of the children accepted the offer, and the settlement was reduced to a consent judgement. Three years after the consent judgement, the appellant discovered that she had been misled about the extent of the father's holdings in Puerto Rico and attempted to set aside the settlement. After examining the record, Florida's Supreme Court found that the complained of conduct, if proven, was the type considered to be intrinsic fraud. The appellant had "every right to reject the settlement until after she could adequately explore the extent of her father's holdings in Puerto Rico." Here, the stipulation was never reduced to a consent judgement. Cecil appealed the probate court's ruling to Florida's 2nd DCA, has had his Petition for Writ of Certiorari denied by the U.S. Supreme Court, and offers Lorraine's "intrinsic fraud" pertaining to the value of Virgil's estate as substantial grounds for a rehearing not previously presented.

Cecil's letter to Judge Sexton dated August 10, 2008, seeking an independent audit and dismissal of order approving final accounting was interpreted by a different Judge Isom to be a motion for a rehearing. By interpreting Cecil's letter to be a motion for rehearing, Judge Isom violated Cecil's rights to procedural due process. This letter was addressed to Judge Sexton, but interpreted to be a motion for rehearing and denied by a different Judge Isom on August 20, 2008, without the benefit of a hearing.

Cecil would like to direct this courts attention to Mr. Rydberg's letter to Judge Isom dated October 19, 2009. This letter with a proposed order was pursuant to a "dismissal docket" hearing, that would have discharged the personal representative "nunc pro tunc" to July 31, 2008. At the time of this letter, the appeal was still pending. Cecil wants this court to know that it appears Lorraine was trying to tangle the case up in case the appellate court ruled in Cecil's favor. This order went unsigned, but the U.S. Supreme Court should understand that: 1) the appeal was still pending 2) Cecil was vulnerable because he was pro se and 3) a closer reading of the proposed order would reveal that it was not presented in good faith.

Cecil has repeatedly stated and provided case law to show this court that Lorraine's failure to produce Virgil's mental disability hospital records is considered "extrinsic" fraud or fraud on the court. Cecil's appeal relies primarily on Declare v. Yohanan, **supra**, which eliminated any distinction between two separate basis for relief from a judgement under the saving clause: "extrinsic" fraud and "fraud upon the court." Therefore, Cecil has used these two forms of fraud interchangeably. This "extrinsic" fraud or fraud

on the court prevented Cecil his opportunity to present his case in court. In Throckmorton v. U.S., 98 U.S. 61 (1878), the United States Supreme Court set forth criteria upon which courts have relied in allowing independent actions to be brought for extrinsic fraud:

> "There is an admitted exception to general rule (that judgments are final) in cases where, by reason by something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue of the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise or compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of plantiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his interest to the other side, these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgement or decree, and open the case for a new fair hearing."

Conclusion

Cecil cites both Fla. R. Civ. P. 1.540(b) and Fed. R. Civ. P. 60(b), which are virtually identical to

ask this court for relief from the final judgments rendered. As grounds for such relief, Cecil's reasons are that Lorraine has committed both "intrinsic and extrinsic" fraud which would make the previously entered judgments or decree's void.

Lorraine's "extrinsic fraud" or fraud on the court for failure to release Virgil's mental disability hospital records: 1) prevented Cecil from presenting his case in court, 2) attributed to Cecil being fraudulently induced to sign the stipulation, and 3) caused the probate court to misinterpret the legal effect of the evidence. Lorraine's "intrinsic fraud" of not revealing the extent of Virgil's estate is an additional issue that should serve as substantial grounds not previously presented for a rehearing.

In Cecil's Petition for Writ of Certiorari, Cecil included a quote from DeClare v. Yohanan, **supra**, in which Florida's Supreme Court defined "fraud on the court" as "falsely promising a compromise." Cecil's position is that the stipulation lacked mutual assent between the parties. McGoey v. State, **supra**. In Throckmorton v. U.S., **supra**, a false promise or compromise was mentioned along with additional reasons to show that there was never a real contest in the case. Cecil feels that due to Lorraine's "extrinsic" fraud of not releasing Virgil's mental history to the court, there was never a real contest in the case.

Cecil has copies of correspondence between Mr. Edenfield and Mr. Rydberg that would indicate Mr. Edenfield was only interested in settling the case. Seven days after Mr. Edenfield filed a motion to produce Virgil's medical records, a stipulation was presented for Cecil to sign. No other intestate heir

signed this document. Since no other intestate heir signed this stipulation, this court should note that this document was prepared in haste and for the purpose of not producing Virgil's medical history to the court. Cecil again cites McGoey v. State, **supra**, to show this court there was "no meeting of the minds" in regards to the nature and scope of the stipulation entered between the parties.

Cecil asks that this court prevent an erroneous deprivation of his private property rights. Mathews v. Eldridge, **supra**. Cecil asks this court to prevent the unlawful divesting of his property. Matter of Estate of Newland, **supra**. Cecil asks the U.S. Supreme Court to grant his Petition for Rehearing.

Respectfully submitted,

Cecil G. Bailey

Pro Se

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